

1. REASONS FOR PARTIALLY DISSENTING OPINION OF JUDGE

FENZ

1. Although I join with my colleagues in Sections 1 through 5.4 of the Decision, I respectfully disagree with the Majority on their interpretation of the nature and scope of the exception contained in Article 15 of the Convention Against Torture as explained in Section 5.5 of the Majority opinion.

2. I first examine where, in my view, the reasoning of the Majority is not convincing. I then put forward my own interpretation of Article 15 based on the ordinary meaning of the terms of the provision in their context and in the light of the objective and purpose of the Convention. Additionally I discuss how permissible subsidiary means of interpretation referenced by the Vienna Convention on the Law of Treaties support my interpretation.

1.1. Reasoning of the Majority Opinion

3. Article 15 of the CAT provides that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against a person accused of torture **as evidence that the statement was made**. In the Majority Opinion, this provision morphs via interpretation into the following rule: Any statement that has been established to have been made as a result of torture shall not be invoked as evidence in any proceedings except against the person accused of torture **for purposes other than proving the truth of the matter asserted in the statement**.

4. In its reasoning, though not the disposition of the Decision, the Majority appears to foresee further qualification of this purpose in individual cases (*e.g.* when it finds that “The Chamber considers that information contained within tortured tainted statements may be used to establish facts other than the truth of the statement, but only for the purposes of determining what action resulted based on the fact that a statement was made.”)¹ I will come to this later.

5. A comparison of the original language of Article 15 and the relevant language used in the disposition of the Decision shows that, simply put, the exception has been changed from allowing the use of a statement obtained by torture **for one purpose** to allowing the use of

¹ Majority Opinion, para. 75.

such statement for **all purposes but one** (i.e. to establish its truth). This is a significant difference and, in itself, a first indication that the interpretation is problematic. It is also surprising because the Majority concedes that the plain language of the exception indicates that it should be read narrowly.²

6. The Majority arrives at this interpretation by identifying an ambiguity in the language of the exception to Article 15 by alleging that it does not clarify “how a statement may be used and for what purpose(s).”³ It then claims to solve this alleged ambiguity by teleological interpretation of the whole of Article 15 (i.e. by reference to the “purposes of Article 15”) and reference to the drafting history.⁴ The Majority then states that generally “the permissible scope of invoking torture-tainted evidence must be determined in line with the general purpose of Article 15.”⁵ This language indicates legislating not interpreting.

7. Consequently, paragraphs 73-77 of the Majority appear less concerned with the interpretation of the original exception, but with establishing that the Majority’s “interpretation” of it does not run counter to (some of) the major purposes of Article 15. Even if this were considered proved, the only thing established is exactly that – the Majority’s exception to Article 15 does not violate the purposes of the Convention. What it does not prove is that this exception was the one intended by the drafters of the Convention. Legislators always have a variety of options when it comes to regulating a certain matter legally. In the end, after balancing relevant concerns, principles and issues, the legislative body decides on one of these options (thereby ruling out the others). And the drafting history shows that the drafters of the Convention have done exactly that.

8. In my view, the Majority, has effectively created their own alternative exception which might, standing on its own, be defensible when measured against the purposes of the Convention but is simply not the one chosen by the legislator.⁶

9. A major concern is obviously that if the Majority were to adopt a more restrictive view, the exception contained in Article 15 would benefit the alleged torturer (and thus go against

² Majority Opinion, para. 72.

³ Majority Opinion, para. 72.

⁴ Majority Opinion, para. 72.

⁵ Majority Opinion, para. 73.

⁶ I doubt that the Majority’s interpretation of Article 15 adequately safeguards the integrity of the proceedings since permitting the use of the statement to establish facts (e.g. a pattern) effectively results in torture tainted evidence permeating proceedings. Potentially lengthy discussions of torture tainted statements in public trial to determine if they are eventually permissible according to the majority decision add to this problem.

the deterrent objective of the Convention)⁷ and would prevent a full assessment of the alleged conduct.⁸ But this is not unusual. In some instances (evidentiary) rules are created that effectively risk “benefiting the Accused” by making prosecution more difficult.⁹ This result is accepted as an unavoidable (though not necessarily intended) consequence after balancing various issues, values and principles at stake.

10. I note that the Majority when applying the exclusionary rule to at least one individual case sees the need to further qualify it.¹⁰ They deal with this issue in the fair trial section of the reasoning. The rationale behind this further qualification remains unexplained. It is not immediately obvious why in the example discussed in this context, the evidence should only be allowed to prove this specific pattern as opposed to other issues unrelated to the truthfulness of the statement.

11. I take from this example that the Majority generally foresees case-related adaptations of the general principle, as stated by them in the dispositive, taking the form of further qualifications of the purpose. This approach is problematic.¹¹ Such case-related further qualifications of the purpose are bound to lead to a highly-fragmented and potentially inconsistent body of jurisprudence – an outcome which is not conducive to the deterrent purpose of the Convention because the general message sent becomes ambiguous.

1.2. Reasoning of the dissenting opinion:

12. I now set forth how I consider Article 15 should be interpreted based on the ordinary meaning of the terms of the provision in their context and in the light of its objective and purpose. I will further reference subsidiary means that support this interpretation.¹²

13. In my opinion, Article 15 aims to prevent that torture-tainted statements are used as sources of information – that is as evidence – for the courts. This prohibition is absolute.

⁷ Majority Opinion, para. 74.

⁸ Majority Opinion, para. 76.

⁹ For example, the exclusionary rule in common law jurisdictions may prevent the prosecutor from adducing evidence supporting the charges because the evidence was obtained through an illegal search. *See e.g., Mapp v. Ohio*, U.S. Supreme Court, 367 U.S. 643 (1961). This exclusionary rule has the effect of making the prosecution more difficult.

¹⁰ *See* Majority Opinion, para. 75, “[...] but only for the purposes of determining what action resulted based on the fact that a statement was made.”

¹¹ The problem of fragmented jurisprudence is already inherent in the general interpretation of Article 15 as described in the dispositive (“[...] for purposes other than proving the truth of the matter asserted in the statement.”

¹² Vienna Convention on the Law of Treaties, Articles 31 & 32.

14. Article 15 covers any reference to, and any use of, torture-tainted statements when it chooses the word “invoke” to describe the prohibited action. The lack of any qualification of the term clarifies that “invoking the statement as evidence” is generally prohibited regardless of the purpose for which it is put forward. Article 15 appears to allow for one “exception” when it states that evidence obtained as a result of torture may be used “against a person accused of torture as evidence that the statement was made”.¹³ I agree with the Majority that the plain language of this provision suggests that it should be interpreted narrowly. In my opinion, however, it is limited to one specific category of persons and one specific use.

15. The language is clear on both: the category of persons – those accused of torture – and the use (purpose) – as evidence that the statement was made. Simply put, the only permissible use is to prove the existence of such statement (and arguably that it was made under torture). The statement can be important evidence to prove that torture occurred. The exception goes to the existence not in any way to the substance of the statement. I believe that the interpretation of the ordinary meaning to be given to the terms of the provision in their context and in the light of their purpose leads to this clear result which is neither ambiguous nor manifestly absurd or unreasonable.¹⁴

16. Reference to subsidiary means supports this reading. It is in this context instructive and relevant that the Inter-American Convention to Prevent and Punish Torture, adopted one year after the CAT, interpreted the exclusionary rule to be limited in this same fashion.¹⁵ Article 10 of that Inter-American Convention provides: “No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.”¹⁶

17. Furthermore, the UN Human Rights Committee states in its authoritative General Comment on the right to equality before courts and tribunals and to a fair trial under the ICCPR (to which Cambodia is party), “[...] as Article 7 (ICCPR) is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by Article 14,

¹³ *Case of Othman (Abu Qatada) v. The United Kingdom* (Application No. 8139/09), 17 January 2012, para. 266 (“Indeed, the only exception to the prohibition that Article 15 allows is in proceedings against a person accused of torture.”).

¹⁴ Vienna Convention on the Law of Treaties, Arts. 31 & 32.

¹⁵ Vienna Convention on the Law of Treaties, Art. 31(3).

¹⁶ Inter-American Convention To Prevent and Punish Torture, Article 10, 1986 (emphasis added).

including during a state of emergency, except if a statement or confession obtained in violation of Article 7 is used as evidence that torture or treatment prohibited by this provision occurred.”

18. Equally compelling is the drafting history of Article 15. The Working Group’s first draft of Article 15 did not provide for *any* permissible uses of torture-tainted evidence. During the drafting of the Convention, language was added to maximize the deterrent effect of the Article by allowing statements to be used in a narrow fashion to prosecute the alleged torturer.¹⁷ To the contrary, an attempt to allow the unlimited use of statements obtained by torture against the alleged torturer was eventually rejected.¹⁸ In summary, the drafting history shows that the current text is the result of careful deliberations.¹⁹

19. The resulting language and the purpose of the exception to Article 15 has been explained by one author involved in the drafting of the Convention as follows: “However, when the statement is invoked in such a manner, the intention is not to prove that the statement is a true statement. The purpose is rather to prove that a specific statement was made under torture and presumably that the tortured person would not otherwise have made the same statement, because it was untrue or because it disclosed certain information which he would not otherwise have been prepared to disclose. Consequently, the exception is more apparent than real.”²⁰

20. In my opinion, it is clear that the purpose of the “exception” is not to establish a substantive exception to the rule but to prevent – by way of this clarification – an overly extensive interpretation of Article 15 which would indeed have bordered on absurd.²¹

¹⁷ An early draft of Article 15 proposed by Sweden did not include any exception; *See* UN Economic and Social Council, 34th session, 23 January 1978, UN Doc. E/CN.4/1285.

¹⁸ *See* Draft Convention for the Prevention and Suppression of Torture, Submitted by the International Association of Penal Law, UN Doc. E/CN.4/NGO/213, 15 January 1978 (“An oral or written statement or confession obtained by means of torture or any other evidence derived therefrom shall have no legal effect whatever and shall not be invoked in any judicial or administrative proceedings, except against a person accused of obtaining it by torture.”)

¹⁹ UN Doc. E/CN.4/1314, UN Economic and Social Council, 35th session, 19 December 1978; UN Doc. 3452 (XXX), UN General Assembly Resolution - Declaration on the protection of all persons from being subjected to torture and other cruel inhuman or degrading treatment, 9 December 1975.

²⁰ Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 (emphasis added). Read in context, it is clear that the author’s remark did not aim to identify the only forbidden use but mentioned one and arguably the most frequently occurring one to make the principled point as evidenced by the bold section.

²¹ Vienna Convention, Article 32.

21. This interpretation of the exception contained in Article 15 is in accordance with the purposes of Article 15 and the Convention which it aims to implement. Only the most important will be discussed subsequently. These were: (1) a public policy of disincentivising torture; (2) preventing the use of unreliable evidence as it is not conducive to ascertaining the truth; (3) preserving the integrity of the proceedings; and (4) protecting the Accused's right to a fair trial, including due process.²² There is no hierarchy between these purposes.

22. First, Article 15 is meant to discourage the use of torture by state authorities for the purpose of obtaining information. I am aware that this argument might be considered weakened in certain cases where the alleged torturer would appear to benefit from a narrow interpretation of the rule. And this possible benefit appears to be a major concern of the Majority opinion. As the drafting history shows, the drafters of the CAT were equally concerned about this possibility. They nevertheless chose the language of Article 15 with the "exception" as the only concession to ease prosecution in cases against the alleged torturer. General deterrence is best achieved where the message is unambiguous and jurisprudence as consistent as possible.²³

23. Second, the exclusionary rule is meant to protect the right to a fair trial by, *inter alia*, preventing the invocation of unreliable evidence. More precisely, it is a mechanism to prevent the use of statements made by an accused or by others under torture as evidence of the truthfulness of admissions or other matters asserted in the statement, because in such circumstances this evidence is intrinsically unreliable.²⁴ The interpretation of the exception chosen by the dissenter provides maximum protection against unreliable evidence in this regard.

²² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60, 10 April 2014, para. 21; Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 ("The rule laid down in article 15 would seem to be based on two different considerations. First of all, it is clear that a statement made under torture is often an unreliable statement; and it could therefore be contrary to the principle of "fair trial" to invoke such a statement as evidence before a court. [...]").

²³ See para. 11.

²⁴ T. 28 May 2009, pp. 7-9; E74, p. 3; E185, para. 21; See also, Herman Burgers and Hans Danelius, *The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988), p. 148 (when such evidence is invoked against an accused, "the intention is not to prove that the statement is a true statement. The purpose is rather to prove that a specific statement was made under torture [...]"). United Nations General Assembly, Torture and other cruel, inhuman or degrading treatment 14 August 2006, U.N. Doc. A/61/259, para. 45; See also, Rome Statute, Article 69(7) which prohibits the admission of evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights if "(a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

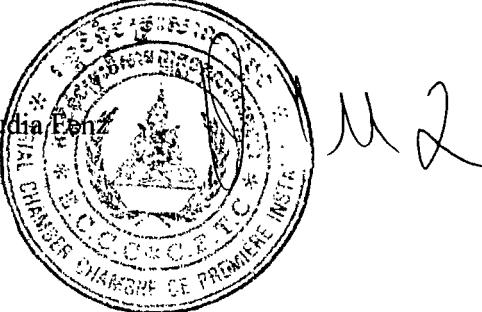
24. Third, the exclusionary rule is also meant to preserve the integrity of the proceedings by preventing the Chamber from according any judicial legitimacy to the abhorrent conduct which procured the evidence.²⁵ The preservation of the integrity of proceedings is another strong argument for a narrow reading of Article 15. Permitting the parties to refer to the statement as proof that it was made under torture allows the Chamber to evaluate allegations of torture, without according any legitimacy to the practice of torture.²⁶

25. In sum, Article 15 is meant to ensure that no information from a statement obtained by torture is used as evidence in proceedings. This prohibition is absolute. The “exception” does not take away from this. Its only objective is to allow the establishment of the existence of such a statement as proof that torture occurred.

26. Any interpretation that reads Article 15 too broadly risks undermining the purpose of the general rule. Given that this rule gives effect to one of the most important protections in international law, any attempt to narrow its applicability, or create ambiguity about its application, needs to be viewed with the utmost caution. The risk of creating a slippery slope and eventually weakening the protection is ever present.

Phnom Penh, 11 March 2016

Claudia Fenz



The image shows the official seal of the Extraordinary Chambers in the Courts of Cambodia (ECCC). The seal is circular and contains the text 'ROYAUME DU CAMBODGE' at the top, 'CHAMBRE EXTRAORDINAIRE' in the middle, and 'DIRECTION DE PREMIERE INSTANCE' at the bottom. In the center of the seal is a stylized emblem. To the right of the seal is a handwritten signature in black ink.

²⁵ *A and Others*, House of Lords, [2005] UKHL 71, Lord Bingham, para. 39 (*noting* appellant’s contention that permitting use of torture-tainted statement would infringe the party’s rights and the fairness of the proceedings, shock the judicial conscience, abuse or degrade the proceedings and involve the state in moral defilement.”); Rome Statute, Article 69(7)(prohibiting the use of evidence obtained in violation of internationally recognized human rights where the violation cases substantial doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.)

²⁶ See para. 8.